

# The European Convention on Human Rights and the Hungarian Legal System

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## I. The status of the ECHR at the national level

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### *1.1. Historical aspects of accession to the ECHR*

**H**ungary was the first “post-communist” country to join the Council of Europe and signed the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR or Convention) on 6 November 1990. The ECHR and its eight Protocols were ratified back in 1992.<sup>1</sup>

Before ratification it was decided to thoroughly scrutinize Hungarian legislation on its compatibility with Strasbourg case law and to first prepare legislation in areas where compliance with the jurisprudence of the Convention organs called for modifications. Thus an Inter-Ministerial Committee was set up chaired by the then Ministry of Justice deputy secretary of state and composed of senior civil servants working in the various ministries. After seventeen months of study and analysis the report was submitted to the government. The conclusions were published in a Hungarian human rights journal and were made available to all Members of Parliament.<sup>2</sup> The Committee identified relatively few areas where the Convention required modification of Hungarian laws. This was partly explained by the fact that by the 1989 amendment of the 1949 Constitution the chapter on human rights was radically modified. Further, Parliament enacted in the years of 1989 and 1990 numerous acts relating to basic rights, such as the right to strike, freedom of assembly, and freedom of conscience. In addition, amendments to the Code of Criminal Procedure and the Penal Code also contributed to narrowing the gap between Hungarian law and the Convention.

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1 The ECHR and its eight Protocols were ratified on 5 November 1992 and incorporated into the Hungarian legal system through Act XXXI of 1993 on 7 April 1993 entering into force eight days later. The Act provides that the Convention and Protocols 1, 2 and 4 have to be applied as of 5 November 1992, Protocol 6 is applicable as of 1 December 1992, and Protocol 7 applied from 1 February 1993.

2 For a detailed summary of the findings see Doc. H(95)2 of the Council of Europe published also in A. Drzemczewski, ‘Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification: The Hungarian Model. Introduction to a Reference Document,’ Human Rights Law Journal, 16 (7–9) (1995), 241–60.

Hungary ratified all but two protocols to the Convention:<sup>3</sup> Protocol 12, which was signed, but not ratified,<sup>4</sup> and Protocol No. 14bis.<sup>5</sup>

## *1.2. Beyond dualism: the relationship between the ECHR and the national legal order*

On 18 April 2011 a new constitution was passed by Parliament by the two-third majority of MPs, signed by the President on 25 April 2011. The document entitled Fundamental Law (hereinafter: FL) entered into force on 1 January 2012. Hungary's FL defines the relation between international and domestic law in the same way as the former Constitution. The FL first stipulates that "Hungary shall ensure the conformity between international law and Hungarian law in order to fulfill its obligation under international law" [Article Q (2)]. Further, the FL proclaims that "Hungary shall accept the generally recognized rules of international law" and that "other sources of international law shall become part of the Hungarian legal system by promulgation" [Article Q (3)].

Generally recognized rules of international law become automatically part of the Hungarian legal order (and in the Constitutional Court's interpretation are above domestic laws), while international treaties must be proclaimed in a domestic law.<sup>6</sup> Thus the FL like the previous Constitution opted for the dualist approach: international treaties must be transformed in the form of an Act of Parliament or a decree to be part of the Hungarian legal system and by this to become directly enforceable.<sup>7</sup> Because rules on fundamental rights and obligations

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3 Protocol 11 to the ECHR restructuring the control machinery established thereby has been signed on 11 May 1994, ratified on 26 April 1995 and is applicable to Hungary from 1 November 1998. The law that implemented the Protocol is Act XLII of 1998. Protocol 13 concerning the abolition of the death penalty in all circumstances was signed on 3 May 2002, and entered into force on 1 November 2003. The corresponding Hungarian law is Act III of 2004. Protocol No. 14 amending the control system of the Convention was signed on 7 April 2005 and ratified on 21 December 2005. The implementing Hungarian law is Act CXXIV of 2005.

4 Protocol 12 was signed on 4 November 2000 but is not yet ratified.

5 Protocol 14bis was signed on 11 November 2009 but not yet ratified. See Decrees of the Prime Minister Nos. 20/2009. (V. 12.) and 32/2009. (VI.18.). Since Russia signed Protocol No. 14 in January 2010 as the last high contracting party, Protocol No. 14bis lost its relevance.

6 Constitutional Court Decision No. 53/1993. (X. 13.).

7 The 'generally recognized rules' are transformed directly by the Constitution (and similarly by the FL). Constitutional Court Decision No. 53/1993. (X. 13.).

may be laid down exclusively in an Act of Parliament, international human rights treaties must also be promulgated in an Act enacted by Parliament.

From all this it may appear that the Convention promulgated by an Act of Parliament has the same rank as any other act and in case of conflict the *lex posterior* prevails. However, in the Constitutional Court's (hereinafter: CC) interpretation the act transforming an international treaty is superior to other acts and in the case of conflict the latter have to be annulled.<sup>8</sup> It should be noted that the fourth amendment to the FL<sup>9</sup> repealed the rulings of the CC given prior to the entry into force of the FL.<sup>10</sup> This was interpreted to mean that the Court is no longer bound by its earlier rulings and may not even make reference to them. However, the CC made it clear that it still may make reference to arguments used in earlier decisions provided that it gives a detailed reasoning why it does so. However, the CC added that due to the fourth amendment to the FL it may disregard legal principles elaborated in earlier decisions even if the text of the given provision in the FL and the previous Constitution is identical.<sup>11</sup> In principle the CC would therefore be free to reconsider its position on the supremacy of acts promulgating international treaties over other Acts of Parliament in the future. Nevertheless in a fear of rule of law backsliding, and in search of standards on which the government had no influence<sup>12</sup> in Decision 61/2011. (VII. 13.) the CC made clear that domestic constitutional protection of human rights must not go

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8 Constitutional Court Decision No. 15/2004. (V. 14.), Decision No. 2/1994. (I. 14.), and Decision No. 99/2008. (VII. 3). For details see P. Bárd, 'Hungary,' in L. Hammer and F. Emmert (eds.), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (The Hague: Eleven Publishing, 2012), 225–6.

9 Adopted by the Hungarian Parliament on 11 March 2013.

10 Article 19 of the fourth amendment to the FL, incorporated as point 5 in the Closing and Miscellaneous Provisions of the Fundamental Law. This provision might have been the legislator's response to the Constitutional Court Decision No. 22/2012. (V. 11.), which explicitly declared that the Court in subsequent cases may use the arguments appearing in its decisions rendered prior to the entry into force of the FL provided that the content of the provision in the FL is identical or similar to that of the previous Constitution and if the rules of interpretation of the FL permit the use of the arguments.

11 Constitutional Court Decision No. 13/2013. (VI. 17.), para. 30–1.

12 Viktor Kazai, „... hogy ne kelljen a múltat "végképp eltörölni"” [Interview with Constitutional Court Justice Miklós Lévy], *Fundmentum* 2016/1, 59–71., 64.

below international level of protection and that the CC must follow the ECtHR case-law.<sup>13</sup>

However, the fact is that both the FL and the law on the CC<sup>14</sup> provide for the review of domestic laws on their compliance with international treaties and not the other way round. According to Article 24 (2) f) of the FL, the CC shall examine whether rules of law are in conflict with an international treaty. Article 24 (3) stipulates that the CC may “annul the law or its provision conflicting with an international treaty”. Article 32 (1) of the law on the CC provides that “(P)ursuant to Article 24 (2) f) of the Fundamental Law, the Constitutional Court shall examine legal regulations on request or *ex officio* in the course of any of its proceedings”. In addition to listing those entitled to request such a review<sup>15</sup> paragraph (2) of the same article provides that “judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty.”<sup>16</sup>

## II. Domestic courts’ referral to the ECHR and the Strasbourg case-law

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Some of the judges of the Curia are appointed by the president of the Curia as advisors on European law to assist – in collaboration with the Office for International Relations and European Law – their colleagues at all levels of the court system in the interpretation of

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13 Constitutional Court Decision No. Decision 61/2011. (VII. 13.), Parts 2.2. and 3.

14 Act No. CLI of 2011 on the Constitutional Court.

15 One-quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor General, and the Commissioner for Fundamental Rights.

16 Judges’ authorization to initiate proceedings before the Constitutional Court constitutes a laudable development. Under the former law on the Constitutional Court (Act No. XXXII of 1989) this could only be done by the president of the Supreme Court and the Chief Public Prosecutor. The Inter-Ministerial Committee preparing the ratification in its report in 1992 suggested that each court should be given the right to suspend the proceedings and invoke the Constitutional Court in case of a perceived conflict between domestic legislation and the Convention. See Drzemczewski, ‘Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification’, 250.

the ECtHR judgments.<sup>17</sup> This is all the more important because – in principle – Hungarian judges are under the obligation to directly apply the Convention and the Strasbourg judgments. According to Act No. L of 2005. on the procedure concerning international treaties “in interpreting an international treaty the decisions of the body entrusted with the authority to settle disputes arising out of the treaty must also be considered” [Article 13(1)]. This provision was meant to put an end to the debate on the extent to which Strasbourg jurisprudence has to be followed in domestic proceedings.<sup>18</sup> Prior to the entering into force of the Law on international treaties only the CC’s duty to observe Strasbourg jurisprudence was obvious due to the constitutional provision that Hungary shall ensure the conformity between international and Hungarian law in order to fulfil its obligation under international law [Article Q (2)]. This debate was supposed to come to an end, but seemingly the 2005 Act did not resolve all debates.

### *II.1. Disregard of the ECtHR case-law: clear violation of national law*

Although the Supreme Court in its judgments dating back to 2003 and 2004 stated that all Hungarian courts have to follow the jurisprudence of the ECtHR, this position was not shared by all judges: some insisted on applying exclusively domestic laws and opined that the ECtHR judgments were not binding for Hungarian courts.<sup>19</sup> Unfortunately, even after the entering into force of Act L of 2005 on the procedure concerning international treaties, there have been cases in which courts consciously disregarded judgments of the ECtHR arguing that those are binding on the government as party to the Strasbourg proceedings only. As the Metropolitan Court of Appeal argued in a case: although the ECtHR “judgments – as a result of legal harmonization – shape Hungarian law, Hungarian courts are not obliged or authorized to apply them directly”.<sup>20</sup>

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17 Article 23(2) of Instruction 9/2012 of the President of the Curia on the Organizational and Operational Regulation of the Curia. Available at <http://www.kuria-birosag.hu/hu/kuria-alkotmanyos-helye-feladatai-es-hataskore>

18 E. Polgári, ‘The European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Hungarian Judicial Practice’, *Fundamentum*, 5 (2008), 74.

19 *Ibid.*, 74–5, 80.

20 Judgment No. Pfv.V.20.607/2007/9. Cited in *ibid.*, 75.

Case *Vajnai v. Hungary* of 8 July 2008, Application number 33629/06 involved Attila Vajnai, then vice-president of the Workers' Party, a Hungarian left-wing political party, who was convicted for wearing a five-pointed red star, the symbol of the international workers' movement banned by Article 269/B of the Hungarian Criminal Code then in force (Act No. IV of 1978) at a demonstration on the streets of Budapest. The Court underlined that there was no real and present danger of any political movement or party restoring Communist dictatorship. As to the red star as a political symbol of totalitarian ideology, the ECtHR noted that the potential propagation of that ideology, however repellent, cannot be the sole reason for criminalization of the use of totalitarian insignia. The red star is a symbol to which several meanings may be attached and in the present case it was used by a leader of a registered political party without any known totalitarian ambitions. His use of the totalitarian symbol cannot be equated with dangerous propaganda in the Court's view. On the contrary, Article 269/B of the Hungarian Criminal Code then in force did not require proof that the actual display amounted to totalitarian propaganda, but limited the use of the red star in an unreasonably broad and indiscriminate way: the use of the red star was prohibited unless it served a scientific, artistic, informational or educational purpose. Therefore, the Court found Hungary to be in violation of Article 10 ECHR. Not just the legislative power, but also judiciary could have remedied the problems of the respective Criminal Code provision by applying the test developed by the ECtHR whenever adjudicating cases of displaying the insignia of totalitarian regimes. Nevertheless, it failed to do so, and continued to hold suspects responsible for wearing the red star, irrespectively of the social and individual contexts. In the *Fratanoló* case,<sup>21</sup> which resulted in finding Hungary again in breach of the Convention for convicting applicant for using the red star in public, the Pécs Court of Appeal argued that it may not apply the test developed by the ECtHR in the *Vajnai* judgment. In the court's opinion it has to apply the provision of the Hungarian Criminal Code according to which the offense is completed by the mere public display of symbols of totalitarian regimes. Therefore the court is prevented from extending the inquiry to further facts as indicated in the *Vajnai* judgment.<sup>22</sup> The second part

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21 *Fratanoló v. Hungary*, No. 29459/10, 3 November 2011.

22 According to the *Vajnai* judgment the criminal conviction for using the red star is in line with the Convention if it can be proven that there was a real danger of restoring Communism and that the defendant identified herself or himself

of the red star saga in front of the CC is an example of good practice, please see Chapter II.3.

In the more recent case *Magyar v Hungary*, the Hungarian system of life imprisonment without parole was challenged and held to be in violation of the Convention.<sup>23</sup> In a series of relevant judgments the Hungarian Constitutional Court and the Supreme Court proved that they were neither capable of enforcing European standards, nor of complying with European review mechanisms,<sup>24</sup> and the latter also instructed ordinary courts not to directly consider the Convention, but apply domestic law instead, even if in clear contradiction of Strasbourg tests. In *Magyar v. Hungary* the ECtHR issued its long awaited judgment on the Hungarian life imprisonment regime, and held that the sanction of life imprisonment as regulated by the respondent state, which is *de jure* and *de facto* irreducible, amounts to a violation of the prohibition of degrading and inhuman punishment as regulated by Article 3 ECHR. The outcome was rather predictable in light of previous Strasbourg case-law, in particular the Grand Chamber decision in *Vinter v. the UK*.<sup>25</sup> The judgment was challenged by the Hungarian government, but the request to the Grand Chamber referral was rejected. The judgment became final in October 2014. First the ECtHR distinguished the case from earlier case-law, in particular from *Törköly v Hungary*,<sup>26</sup> where the Applicant was not excluded from conditional release since the domestic court imposed a life sentence on him, with eligibility for release on parole after 40 years. There the Court applied a lower scrutiny to the institution to presidential pardon. In the *Magyar* case however, the Applicant was excluded from conditional release, therefore a stricter review applies to his case. The stricter test made the Court come to the following conclusion: since domestic Hungarian legislation did

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with the meaning of the sign representing a totalitarian regime. For a critical assessment of the position of the Pécs Court of Appeal, Pfv.V.20.607/2007/9. Bárd, 'The non-enforcement of Strasbourg decisions and its consequences'.

23 ECtHR, *Magyar v Hungary*, No. 73593/10, 20 May 2014.

24 For the saga see P. Bárd, The Hungarian life imprisonment regime in front of apex courts I. – The findings of the European Court of Human Rights and the Constitutional Court, 18 June 2015, <http://jog.tk.mta.hu/blog/2015/06/the-hungarian-life-imprisonment-hu> and P. Bárd, The Hungarian life imprisonment regime in front of apex courts II. – The findings of the Kúria (Supreme Court), 18 June 2015, <http://jog.tk.mta.hu/blog/2015/06/the-hungarian-life-imp-hu>.

25 ECtHR, *Vinter v. the UK*, Nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

26 ECtHR, *Törköly v Hungary*, No. 4413/06, 5 April 2011.



not oblige the authorities or the President of the Republic to assess, whenever a prisoner requested a pardon, whether his or her continued imprisonment was justified on legitimate penological grounds, and since they were not bound to give reasons for the decisions concerning such requests, the ECtHR considered that the institution of presidential pardon, taken alone did not allow prisoners to know what they had to do to be considered for release and under what conditions, and did not guarantee proper consideration of the changes and progress towards rehabilitation made by the prisoner. The discretionary nature of the presidential pardon led the Court to believe that the life imprisonment of Mr. Magyar was in fact irreducible in breach of Article 3 of the Convention. The Court also noted that the human rights violation was caused by a systemic problem, which may give rise to similar applications, and therefore suggested a legislative reform of the system of review of whole life sentences.

The Hungarian legislative responded to the judgment by a modification of the Penitentiary Code.<sup>27</sup> According to the new review mechanism prisoners sentenced to real life imprisonment have the right to have the possibility of conditional release examined, after having served 40 years in prison. The end of a complex review mechanism is a judicial body's, the Pardon Committee's reasoned opinion, which might or might not be taken into account by the President who retains the final and discretionary say on pardon. The new law still kept the problematic parts of the earlier regulation: the President of the Republic deciding on pardon is not bound by the opinion of the Pardon Committee, and is not obliged to give a reasoned opinion, therefore aspects decisive to have a realistic chance of conditional release can still not be foreseen at the time of imposing the life sanction. At the same time, the new process was likely to fail on the ground that pardon may take place after 40.<sup>28</sup>

The Hungarian Constitutional Court (hereinafter: HCC) had a chance to remedy the situation and could have prevented yet another attack on the life imprisonment regime in front of the ECtHR. However the HCC

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27 See Article 109 of Act LXXII of 2014, which inserted a new subtitle on the mandatory pardon proceeding of persons sentenced to life imprisonment without the possibility of conditional release, Articles 46/A-46/H into Act CCXL of 2013.

28 As foreseen by P. Bárd, *op. cit.*

missed this opportunity in HCC Resolution 3013/2015. (I. 27.). In a rather dubious decision the majority of the court rejected the complaint and did not decide the case in the merits. The majority noted that the rules on life imprisonment changed since the constitutional challenge was submitted. The majority held that the new rules introduced by the Penitentiary Code on the Pardon Committee procedure were new circumstances that made the case substantially obsolete, and therefore the procedure was terminated. The majority decision was harshly criticized for a lack of causal relation between the change of the law and a constitutional review becoming obsolete.<sup>29</sup> These voices stated the obvious: the mere fact that a law was amended does not automatically render the modification constitutional.

As a means of individual measure of enforcement in its decision of 11 June 2015 the Kúria, the Supreme Court of Hungary had to decide on Mr. Magyar's case again in the review procedure. The judgment was rendered in the middle of political pressures not to destroy the constitutionally entrenched<sup>30</sup> institution of life imprisonment without parole.<sup>31</sup> Two issues needed to be decided by the Kúria in light of the Strasbourg *Magyar* judgment: the procedural form reviewing the possibility and the earliest date of conditional release. The Kúria acknowledged that the Hungarian law's Pardon Committee review mechanism contravened the Convention as interpreted by the ECtHR due to its discretionary nature. Therefore the Kúria disregarded the new piece of law, sentenced Mr. Magyar to life, with conditional release possible after 40 years the earliest. By refusing the Pardon Committee

29 Eötvös Károly Institute, Immár "nyilvánvalóan okafogyott" az Alkotmánybírósághoz fordulni [It became clearly obsolete to turn to the Constitutional Court], <http://www.ekint.org/ekint/ekint.news.page?nodeid=769>.

30 The possibility of real life imprisonment was constitutionally embedded into Article IV Section (2) of the Fundamental Law, which holds that real life imprisonment may only be imposed for the commission of intentional and violent criminal offences. One should read this provision in conjunction of Article Q Section (2) of the Fundamental Law on Hungary's obligation to ensure that Hungarian law was in conformity with international law.

31 Nem fogjuk hagyni a tényleges életfogytiglan eltörlését [We will not let the abolition of the real life imprisonment regime], 28 May 2015, <http://www.fidesz.hu/hirek/2015-05-28/nem-fogjuk-hagyni-a-tenyleges-elfogytiglan-eltorleset/>; Szükség van a tényleges életfogytiglanra a többszörösen visszaeső bűnözőkkel szemben [Real life imprisonment is needed for recidivists], 10 June 2015, <http://www.fidesz.hu/hirek/2015-06-10/szukseg-van-a-tenyleges-elfogytiglanra-a-tobbszorosen-visszaeso-bunozokkel-szemben/>

proceeding and placing the decision on a potential future conditional release of Mr. Magyar into the hands of the judiciary, the Kúria created a *Törköly*-like scenario, and therefore the Hungarian justices believed that their judgment could not be successfully attacked in front of the ECtHR. The Kúria dismissed the possibility of taking the ECtHR cases other than those decided against Hungary into account. With this problematic stance, it excluded the *Vinter* case from its review, and as a consequence refused to go into the merits of the 40-year-rule. A week later a resolution concerning the uniformity of criminal law was issued by another Section of the Kúria,<sup>32</sup> making clear that the Magyar case must not set precedent, and that it should have been decided taking the new pardon committee procedure into account. The Kúria also took the stance that in case a criminal procedure is reopened as an individual measure of enforcement, the court shall not directly rely on the Convention, but shall apply domestic law not effected by the Strasbourg judgment. The Kúria also stated that Hungarian courts must not assess Hungarian laws in light of the Convention. It insisted that life imprisonment without the possibility of parole is allowed by international law, and that the ECtHR case law, the Hungarian Constitutional Court's decision or the above mentioned Magyar decision do not offer reasons to depart from the newly established pardon procedure. This statement is difficult to interpret, since the Constitutional Court did not decide on the new procedure in the merits, whereas the Strasbourg jurisprudence is in clear contradiction with the new rules.

As a consequence of the Hungarian disrespect for Strasbourg decisions, the ECtHR refined its position in a judgment where it found Hungary's new legislation on whole life sentences again to be in violation of Article 3 of the Convention. In *T. P and A. T. v. Hungary*<sup>33</sup> the Court found the 40-year-rule for reviewing the possibility of conditional release as too long and a violation of its earlier case-law, namely *Vinter v. the UK*.<sup>34</sup> The ECtHR not only made clear that the new law is in violation of the Convention, but it indirectly condemned the Kúria for not taking its case-law into consideration, other than cases where Hungary was a Respondent, in the review procedure. At the same time there was a lack of sufficient safeguards in the remainder of the procedure foreseen by

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<sup>32</sup> Resolution No. 3/2015 concerning the uniformity of criminal law.

<sup>33</sup> *T. P and A. T. v. Hungary*, Nos.: 37871/14 and 73986/14, 4 October 2016.

<sup>34</sup> ECtHR, *Vinter v. the UK*, Nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

the new Hungarian legislation. The ECtHR was therefore not persuaded that, the applicants' life sentences provided them with the prospect of release or a possibility of review. The judgment is not yet binding. The Hungarian Ministry of Justice thinks the Strasbourg judgment is ill-founded and considers appealing to the Grand Chamber.<sup>35</sup>

## *11.2. Cherry-picking from the case-law and abusive references to the Strasbourg jurisprudence*

Fortunately more and more courts in Hungary invoke Strasbourg jurisprudence in different type of cases, such as custody of children, pretrial detention, judges' disqualification for lack of impartiality, or in personality rights lawsuits.<sup>36</sup> It must also be noted that when reading the references to Strasbourg jurisprudence in some of the decisions of higher courts and of the CC one may gain the impression that the ECtHR case law is invoked rather to give additional legitimacy to the conclusion the courts have already arrived at under Hungarian law.<sup>37</sup>

From time to time in order to justify the desired outcome courts invoke Strasbourg jurisprudence when this is clearly inappropriate, or arbitrarily select certain passages of the ECtHR decisions that are in contrast with the spirit of the judgment at hand.

The CC, for instance, in the decision finding the provision of the Criminal Code that penalizes the violation of national symbols to be compatible with the Constitution,<sup>38</sup> invoked the *Otto-Preminger Institute*<sup>39</sup> and *Wingrove*<sup>40</sup> judgments. It rightly noted that in those cases the interference with the applicants' freedom of expression was found to be justified for the protection of others' right to respect for religious feelings but drew the arbitrary conclusion that the conviction

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35 See the government's website at <http://www.kormany.hu/hu/igazsagugyi-miniszterium/hirek/aggalyos-a-tenyleges-eletfogytig-tartoszabadsagvesztessel-kapcsolatos-itelet>, 4 October 2016

36 For references to the ECtHR case law see E. Polgári, 'The European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Hungarian Judicial Practice' *Fundamentum*, 5(2008), 74–80.

37 Viktor Kazai, *op. cit.*

38 Constitutional Court Decision No. 13/2000. (V. 12.).

39 *Otto-Preminger Institute v. Austria*, No. 13470/87, 20 September 1994, Series A295-A.

40 *Wingrove v. United Kingdom*, No. 17419/90, 25 November, the ECHR 1996-V.

and feeling of belonging to a given state should be afforded similar protection. The CC disregarded the fact that the ECtHR found the interference acceptable through reading Articles 9 and 10 of the Convention together, while the “feeling of belonging to a certain state” may not be brought under any right listed in the ECHR.<sup>41</sup>

The decision of the Metropolitan Court on the prolongation of the pretrial detention in the case underlying the *Hagyó* judgment of the ECtHR<sup>42</sup> involving an opposition politician, is a striking example of the abusive reference to Strasbourg jurisprudence, taken out of context in order to justify conclusions that are opposite to what the ECtHR has ruled.<sup>43</sup> According to the decision “there is extremely pressing public interest in fully and accurately exploring the criminal conduct that caused loss of state property of a magnitude unprecedented in the history of the Republic of Hungary and in convicting all members of the criminal organization suspected of having committed the crimes. The unimpeded conduct of the investigation requires that the suspects are completely deprived of their personal liberty. The authorities’ activity aiming at proving the suspects’ guilt must be given preference over the rights of the suspects. The suspects’ right to liberty is outweighed by the public interest in prolonging the pre-trial detention”. The Metropolitan Court noted without indicating one single judgment that this was the position of the ECtHR.<sup>44</sup>

### *II.3. References to the ECHR and the related case-law by domestic courts: good practices*

Undoubtedly, the Strasbourg jurisprudence has had an impact on enhancing the democratic process and political pluralism. The first set of relevant cases concerns the **freedom of assembly**. In *Bukta and others v. Hungary*<sup>45</sup> the Court found that the dispersal of a spontaneous peaceful

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41 Judge Németh in his concurring opinion noted that the reference to the ECtHR judgments and the conclusion drawn was incorrect.

42 *Hagyó v. Hungary*, No. 52624/10, 23 April 2013. The Court found Hungary in violation of Articles 3, 5(3), 5(4), 8, and Article 13 in conjunction with Article 8.

43 Case No. 30. Bnf. 1355/2010.

44 Metropolitan Court, Bnf. 1355/2010/2., 26 May 2010. The full text of the decision is available at <http://hagyomiklos.com/files/07.pdf>. We are grateful to Mr. A. Kádár, copresident of the Hungarian Helsinki Committee for drawing attention to the decision of the Budapest Court.

45 *Bukta and others v. Hungary*, No. 25691/04, 17 July 2007.

assembly because of the demonstrators' failure to notify the police in advance was in breach of Article 11. Following the Bukta judgment the CC ruled that freedom of assembly extends also to demonstrations held without prior organization and annulled the provision of the law on freedom of assembly (Act No. III of 1989) which listed the absence of prior notification among the grounds for dispersing demonstrations.<sup>46</sup>

In *Patyi and others v. Hungary*<sup>47</sup> the ECtHR found that the interference with the applicants' freedom of assembly had been disproportionate. The applicants who were among the creditors of an insolvent private company were planning to hold silent demonstrations in front of the prime minister's private home. They duly notified the police, which refused to grant permission with the explanation that the demonstration would hinder traffic. The decision of the police was confirmed by the Budapest Regional Court. Although the interference pursued the legitimate aims of protecting others' rights and the prevention of disorder the ECtHR found the explanation given by the police and the court unconvincing and concluded that the limitation of the applicants' freedom of assembly was not necessary in a democratic society.

Second, the preceding judgments of the ECtHR have broadened the scope of **freedom of expression** and contributed significantly to the strengthening of political pluralism primarily through rulings of the CC. In 1994 the CC found in its decision focusing on freedom of the press<sup>48</sup> that the criminal offense of insult to an authority or an official that carried a heavier penalty than ordinary slander and defamation is incompatible with the freedom of expression as guaranteed in the Constitution and repealed the relevant provision of the Criminal Code. The CC asserted that, with the annulling of the offense, the reputation of public figures and those exercising official authority is protected under the general provisions of the Criminal Code on slander and defamation.

The decision of the CC also implicitly modified the provision on slander if committed to the detriment of officials and politicians. According to the relevant provision of the Criminal Code the offender was criminally

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46 Constitutional Court Decision No. 75/2008. (V. 29.).

47 *Patyi and others v. Hungary*, No. 5529/05, 7 October 2008.

48 Constitutional Court Decision No. 36/1994. (VI. 24.).

liable of an allegation if that could impugn the honor of the injured party irrespective of the truthfulness of the allegation. However, the court could permit the defendant to prove the truthfulness of the allegation if this was justified by public or pressing private interest. If permission was granted and the defendant succeeded in proving the truthfulness of the slanderous allegation he or she had to be acquitted. Accordingly only proven truth precluded criminal liability.<sup>49</sup>

However, with respect to slanderous allegations made in respect of politicians and other public figures, the CC asserted that the person making the allegation can be held criminally liable only if he or she knew that the statement was in essence untrue, or was only unaware of its untruthfulness because he or she failed to display the necessary care and circumspection incumbent upon him or her according to the relevant rules of his or her vocation or profession. Thus, contrary to the text of the Criminal Code, the CC recognized impunity also for false allegations provided that the injured party was a public figure and the defendant could not be blamed for negligence with regards to the error in fact.

The CC relied heavily on the case law of the ECtHR. It summarized and employed the principles developed by the Court on the scope and the limits of criticism infringing the honor of politicians and public officials in the leading cases such as *Lingens v. Austria*,<sup>50</sup> *Castells v. Spain*,<sup>51</sup> or *Thorgeirson v. Iceland*.<sup>52</sup>

In 2004 the CC – through the adoption of a constitutional requirement – extended the immunity of Members of Parliament on their expressions containing a value judgment made against fellow Members of Parliament s, politicians acting in public, or persons exercising public power in the context of debates pertaining to public affairs.<sup>53</sup> The CC reviewed the rules on the immunity of Members of Parliament in constitutional democracies and with reference to numerous judgments it summarized the Strasbourg case law on politicians' freedom of speech. The CC stressed the importance of free debate of public

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49 Act No. IV of 1978 on the Criminal Code, Article 232.

50 *Lingens v. Austria*, No. 9815/82, 8 July 1986, Series A103.

51 *Castells v. Spain*, No. 11798/85, 23 April 1992, Series A236.

52 *T. Thorgeirson v. Iceland*, No. 13778/88, 25 June 1992, Series A239.

53 Constitutional Court Decision No. 34/2004. (IX. 28.).

affairs in Parliament and concluded that in the case of allegations that could impugn the honor of a politician the immunity of a Member of Parliament can be suspended only if he or she knew that the statement was, in essence, untrue. By this the CC further broadened impunity from prosecution for slander: Members of Parliament may not be held criminally liable for false allegations even if the error can be attributed to their failure to display the necessary care provided that the allegation concerns public affairs and is made against other politicians or persons exercising public power. In sum, the ECtHR case law through the decisions of the CC has had considerable impact on raising awareness of the crucial place of uninhibited political speech in a democratic society. This is true, even if some recent legislative measures raise concerns, and it may not be ruled out with certainty that the achieved standard in guaranteeing freedom of political speech will be lowered. As noted earlier, the Venice commission had criticized the provision of the fourth amendment of the FL,<sup>54</sup> which prohibits the exercise of the right to freedom of speech “with the aim of violating the dignity of the Hungarian nation”. The Venice commission rightly fears that this provision could easily be abused for curtailing the criticism of the Hungarian institutions and office holders. The new Criminal Code penalizes the violation of not only the national anthem, the flag, or the coat of arms of Hungary as did the previous Criminal Code, but also violation of the Holy Crown [Article 334 of Act No. C of 2012]. The fourth amendment to the FL brought about a rather problematic change to political advertisement during election campaigns: parties and candidates may only publish political content through the public media, which as research and perception shows stands close and is loyal to the governing coalition [Article IX (3)].

We shall come back to the follow-up of the judgments *Vajnai v. Hungary* and *Fratanoló v Hungary* on the wearing of a five-pointed red star discussed *supra*. Following the ECtHR judgment in Attila Vajnai’s case, the applicant was acquitted by the Supreme Court in March 2009, but because the law was not changed he was tried and made responsible for the wearing the red star act again.<sup>55</sup> As a result of the constitutional

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54 European Commission for Democracy through Law (Venice Commission), Opinion No. 720/2013, CDL-AD(2013)012, Strasbourg, 17 June 2013 (Opinion).

55 In the meanwhile a new Criminal Code, Act C of 2012 has been adopted and the provision on the display of insignia of totalitarian regimes was taken over without changes. (Article 335 of the Hungarian Criminal Code)



complaint by Mr. Vajnai, the CC reviewed the provision on the display of insignia of totalitarian regimes after 13 years again in its decision 4/2013 (II. 21.). The Act on the Constitutional Court allows for a second review if circumstances significantly changed in the meanwhile,<sup>56</sup> and a Strasbourg judgment amounts to such a significant change. With regard to the ECtHR case-law, the CC invalidated the respective Criminal Code provision as of 30 April 2013. As a result Parliament reinserted a modified version of the provision into the Criminal Code, and according to new Article 335 the commission of the act needs to be capable of disturbing public peace – in particular in a way of violating the human dignity or piety of victims of dictatorial regimes – in order for it to qualify as a crime.

A number of provisions of Act XIX of 1998 on the Criminal Procedure as amended in 2002, 2003 and 2006 are supposed to ensure a **speedy proceeding**. According to Article 176, the investigation has to commence within the shortest possible period and has to be concluded within two months following its order or start. The prosecutor can extend this deadline by two months, in a complex case. After the lapse of that deadline, only the County Prosecutor General may postpone the deadline up to one year from the commencement of the criminal proceedings. After one year, the deadline of the investigation may be extended by the Prosecutor General. Should the investigation be conducted against a specific person, the extension may not be longer than two years.

According to Article 179 detained suspects have to be interrogated within twenty-four hours. In line with Article 216 after the inspection of the documents of the investigation, within thirty days after receiving the documents, the prosecutor has to examine the files of the case and take an action (perform further investigation, suspend or terminate the investigation, or file an indictment). In exceptional cases, this deadline may be extended by the head of the prosecutor's office by thirty days.

In complicated cases, at the recommendation of the head of the prosecutor's office, the superior prosecutor may exceptionally permit a longer – but maximum ninety-day – deadline.

According to Article 287 on the continuity of the trial, the court shall not interrupt an already commenced trial, unless required due to the

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56 Act CLI of 2011 on the Constitutional Court, Article 31.

scope of the case or for other reasons. In these exceptional cases, the presiding judge may interrupt the already commenced trial for a maximum eight days, and the court may adjourn the trial. Within six months, the trial may be resumed without repetition, unless the composition of the panel has changed; otherwise the trial has to be recommenced anew. As to the appeal at second and third instance, Articles 358 and 391 provide that the chairperson of the panel of the court sets the trial date within 60 days from the date when she or he received the document.

Decision 155/2005. (X.4.) of the National Council of Justice as amended through Decision 78/2007. (VI.5.) obliges the courts to annually inform the National Council of Justice of cases processed for more than five years. The National Council of Justice also asked the Supreme Court, and Appellate Courts to discuss the ECHR cases in professional workshops. Furthermore, the Hungarian Judicial Academy is to incorporate in its courses Article 6(1) case law of the ECtHR.

### III. Conclusions

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In 2012 Gábor Kardos, professor of international human rights law, recalled the concerns voiced by Western European experts more than twenty years ago when the accession of the former Communist countries of Eastern Europe had been put on the agenda. He also made an attempt to assess taking Hungary as the example whether the concerns have proven to be valid or not.<sup>57</sup> As Kardos observes, it was feared that the accession of the transition countries would lower the level of protection reached by the early 1990s resulting in the alienation of the old state parties from their own human rights protection system. It was also anticipated that as a result of the applications from the new Member States the ECtHR would be confronted with problems of basically political nature such as the protection of minorities, compensation for property nationalized after World War II, or difficulties arising from prosecution of crimes committed under the Communist regime. This – in the skeptics' view

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57 G. Kardos, 'Az Emberi Jogok Európai Bírósága és Magyarország: Jogi kultúra és hatékonyság' [The European Court of Human Rights and Hungary: Legal Culture and Efficiency], *Kriminológiai Közlemények* (Magyar Kriminológiai Társaság, 2012), 205–7.

– would have hindered the ECtHR in further refining its jurisprudence on human rights problems arising in the context of established democracies of Western Europe. As regards the Hungarian experience Kardos concludes that the fears and concerns have proven to be unfounded. The Court was successful in avoiding the use of a ‘double standard’ and the judgments rendered in respect of Hungary have not lowered the level of protection. The Court, of course, was confronted with cases that had their source in the Communist past. In *Rekvényi*<sup>58</sup> the Court accepted the restriction imposed on police persons’ political activities taking into account – among others – the difficulties new democracies were faced with in the period of transition. However, the Court in *Vajnai* and *Fratanoló* made it clear that the historical experience of a nation that it was prepared to consider right after the collapse of the Communist regime when assessing the necessity of the interference may no longer be invoked with the passing of time when the country had become a stable democracy.

The ECtHR has contributed to strengthening democracy in Hungary through, among others, judgments concerning the right to vote, freedom of expression, and access to information. Its jurisprudence has become part of Hungarian legal culture. Strasbourg case law is regularly invoked by the Hungarian CC and human rights NGOs, and an increasing number of attorneys use frequently the ECtHR jurisprudence in litigation before domestic courts. Courts from time to time invoke the ECtHR judgments, but this is certainly not the rule. However, research indicates that also in the Western European democracies it took for judges two decades to regularly rely on judgments of the Strasbourg Court.<sup>59</sup>

Because structural deficiencies may not be corrected overnight we may expect a further increase in the number of applications. A further reason for this is that the CC, as compared to earlier times, has less opportunity to quash laws that fail to comply with the judgments of the ECtHR. First, the competence of the CC has been narrowed down. Second, laws found unconstitutional by the earlier judgments of the CC

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58 *Rekvényi v. Hungary*, No. 25390/94, 20 May 1999, ECHR 1999-III.

59 G. Kardos, ‘Az Emberi Jogok Európai Bírósága és Magyarország: Jogi kultúra és hatékonyság’ [The European Court of Human Rights and Hungary: Legal Culture and Efficiency], *Kriminológiai Közlemények* (Magyar Kriminológiai Társaság, 2012), 207.

have now been incorporated into the FL. Finally, laws running counter to the jurisprudence of the ECtHR (such as the provision in the Criminal Code on mandatory life imprisonment<sup>60</sup> or the law criminalizing homelessness<sup>61</sup>) have been adopted exactly on the basis of the FL. These are just a few examples which will all likely contribute to an increase of the workload of the Strasbourg Court.

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60 Act No. C of 2012. Article 90 (2)

61 Article 1 of Act No. CLIII of 2011 amending Act No. LXIX of 1999 on Petty Offenses.